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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

JAVIER MANCILLA LUNA,) Case No. EDCV 11-00758-MLG
Plaintiff,) MEMORANDUM OPINION AND ORDER
v.)
MICHAEL J. ASTRUE,)
Commissioner of the)
Social Security)
Administration,)
Defendant.)

)

Plaintiff Javier Mancilla Luna seeks judicial review of the Commissioner's final decision denying his application for Social Security Disability Insurance ("DIB") benefits. For the reasons stated below, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings.

I. Background

Plaintiff was born on October 21, 1965. (Administrative Record ("AR") at 20, 113.) He completed twelve years of education in Mexico and has no other educational or vocational training. (AR at 20.) Plaintiff has work experience performing door and cabinet installation and R.V.

1 assembly. (AR at 19.)

2 Plaintiff filed an application for benefits on March 7, 2008,
3 alleging that he had been disabled since November 30, 2006, due to a
4 spinal injury. (AR at 124.) Plaintiff's application was denied initially
5 on May 2, 2008, and upon reconsideration on September 3, 2008. (AR at
6 40-44, 48-52.) An administrative hearing was held on January 28, 2010,
7 before Administrative Law Judge ("ALJ") Jesse J. Pease at which
8 Plaintiff was represented by counsel. Plaintiff testified at the
9 hearing, as did a vocational expert. (AR 465-484.)

10 On March 11, 2010, ALJ Pease denied Plaintiff's application for
11 benefits. (AR at 7-21.) The ALJ found that Plaintiff had not engaged in
12 substantial gainful activity during the period at issue. (AR at 15.) The
13 ALJ further found that the medical evidence established that Plaintiff
14 suffered from the severe impairment of status-post posterolateral fusion
15 L4 to the sacrum with pedicle screws bilaterally at L4, L5 and S1 and
16 repeat decompression laminotomy at L4-L5 bilaterally. (Id.) The ALJ
17 concluded that Plaintiff's impairments did not meet, or were not
18 medically equal to, one of the listed impairments in 20 C.F.R., Part
19 404, Subpart P, Appendix 1. (Id.) The ALJ next found that Plaintiff
20 retained the residual functional capacity to perform light work as
21 defined in 20 C.F.R. 404.1567(b) with the following exceptions:

22 the claimant can lift and/or carry 20 pounds occasionally and
23 10 pounds frequently; he can stand and/or walk for six hours
24 out of an eight-hour workday with regular breaks; he can sit
25 for six hours out of an eight-hour workday with regular
26 breaks; he must be allowed to change positions every 30
27 minutes for up to 10 minutes; he can perform occasional
28 postural activities; and he understands and speaks very little

1 English.

2 (Id.)

3 The ALJ determined that Plaintiff was unable to perform his past
4 relevant work. (AR at 19.) However, the ALJ found that there were jobs
5 that exist in significant numbers in the national economy that
6 Plaintiff could perform, such as garment sorter, hand packager, and
7 bench assembly. (AR at 20-21.) The ALJ concluded, therefore, that
8 Plaintiff was not disabled within the meaning of the Social Security
9 Act. See 20 C.F.R. § 416.920(f).

10 On March 25, 2011, the Appeals Council denied review (AR at 1-3)
11 and Plaintiff timely commenced this action for judicial review. On
12 March 5, 2012, the parties filed a Joint Stipulation ("Joint Stip.")
13 of disputed facts and issues. Plaintiff contends that (1) the ALJ's
14 residual functional capacity assessment is not supported by
15 substantial evidence; and (2) the ALJ failed to make a proper
16 credibility determination. (Joint Stip. at 3.) Plaintiff seeks remand
17 for a new administrative hearing. (Joint Stip. at 17.) The
18 Commissioner requests that the ALJ's decision be affirmed. (Joint
19 Stip. at 18.)

20

21 **II. Standard of Review**

22 Under 42 U.S.C. § 405(g), a district court may review the
23 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
24 decision must be upheld unless "the ALJ's findings are based on legal
25 error or are not supported by substantial evidence in the record as a
26 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra*
27 v. *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
28 means such evidence as a reasonable person might accept as adequate to

1 support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
2 *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more
3 than a scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Sec.*
4 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To determine whether
5 substantial evidence supports a finding, the reviewing court "must
6 review the administrative record as a whole, weighing both the
7 evidence that supports and the evidence that detracts from the
8 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th
9 Cir. 1996). "If the evidence can support either affirming or reversing
10 the ALJ's conclusion," the reviewing court "may not substitute its
11 judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

12

13 **III. Discussion**14 **A. The ALJ Improperly Discredited Plaintiff's Subjective**
15 **Symptom Testimony**

16 Plaintiff contends that the ALJ improperly discredited his
17 subjective symptom testimony. (Joint Stip. at 11.) To determine
18 whether a claimant's testimony about subjective pain or symptoms is
19 credible, an ALJ must engage in a two-step analysis. *Vasquez v.*
20 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (citing *Lingenfelter v.*
21 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)). First, the ALJ must
22 determine whether the claimant has presented objective medical
23 evidence of an underlying impairment which could reasonably be
24 expected to produce the alleged pain or other symptoms. *Lingenfelter*,
25 504 F.3d at 1036. "[O]nce the claimant produces objective medical
26 evidence of an underlying impairment, an adjudicator may not reject a
27 claimant's subjective complaints based solely on a lack of objective
28 medical evidence to fully corroborate the alleged severity of pain."

1 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). To
 2 the extent that an individual's claims of functional limitations and
 3 restrictions due to alleged pain is reasonably consistent with the
 4 objective medical evidence and other evidence in the case, the
 5 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186 at
 6 *2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).¹

7 Unless there is affirmative evidence showing that the claimant is
 8 malingering, the ALJ must provide specific, clear and convincing
 9 reasons for discrediting a claimant's complaints. *Robbins*, 466 F.3d at
 10 883. "General findings are insufficient; rather, the ALJ must identify
 11 what testimony is not credible and what evidence undermines the
 12 claimant's complaints." *Reddick*, 157 F.3d at 722 (quoting *Lester v.*
 13 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). The ALJ must consider a
 14 claimant's work record, observations of medical providers and third
 15 parties with knowledge of claimant's limitations, aggravating factors,
 16 functional restrictions caused by symptoms, effects of medication, and
 17 the claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-
 18 84 & n.8 (9th Cir. 1996). The ALJ may also consider an unexplained
 19 failure to seek treatment or follow a prescribed course of treatment
 20 and employ other ordinary techniques of credibility evaluation. *Id.*
 21 (citations omitted).

22 Plaintiff testified to the following at the administrative
 23 hearing: He has pain in his low back and both legs. He can stand for
 24 only 10 to 15 minutes before he has to sit; he can walk for only 25 to
 25

26 ¹ "The Secretary issues Social Security Rulings to clarify the
 27 Secretary's regulations and policy Although SSRs are not published
 28 in the federal register and do not have the force of law, [the Ninth
 Circuit] nevertheless give[s] deference to the Secretary's interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3.

1 30 minutes before he has to rest; and he can sit for only 20 to 25
2 minutes before he has to change positions for 5 or 10 minutes. He can
3 lift at most 15 to 20 pounds. He has to lie down four or five times
4 every day for 15 to 20 minutes at a time because of the pain and
5 because his pain medication makes him sleepy. (AR at 471-475.) Here,
6 the ALJ found that Plaintiff's medical impairments could reasonably be
7 expected to produce the alleged symptoms. (AR at 16.) He was therefore
8 required to provide specific, clear and convincing reasons for
9 rejecting Plaintiff's subjective allegations of pain and functional
10 limitations.

11 However, the ALJ did not provide any specific reasons for
12 rejecting Plaintiff's testimony, but rather merely stated that the
13 objective medical evidence did not support the alleged severity of
14 Plaintiff's symptoms and limitations, without specifying what medical
15 evidence in the record contradicts Plaintiff's subjective complaints.
16 (AR at 16-17.) This was error. See *Burch v. Barnhart*, 400 F.3d 676,
17 681 (9th Cir. 2005) (noting that "lack of medical evidence cannot form
18 the sole basis for discounting pain testimony"). Although "the medical
19 evidence is a relevant factor in determining the severity of the
20 claimant's pain and its disabling effects," once a claimant produces
21 objective medical evidence of an underlying impairment, an ALJ "may
22 not reject a claimant's subjective complaints based solely on lack of
23 objective medical evidence to fully corroborate the alleged severity
24 of pain." *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th Cir. 2001).

25 Here, the ALJ provided no other reason for discrediting
26 Plaintiff's testimony other than that it was not supported by the
27 objective medical evidence. Because the sole reason given by the ALJ
28 for failing to credit Plaintiff's testimony regarding his symptoms and

1 related limitations was not supported by substantial evidence,
2 Plaintiff is entitled to relief on this claim.

3 **B. The ALJ Failed to Properly Assess Plaintiff's RFC**

4 Plaintiff contends that the ALJ failed to properly consider the
5 medical evidence in assessing his RFC. (Joint Stip. at 4.) Plaintiff
6 argues that the ALJ's assessment that he is capable of standing and/or
7 walking and sitting for up to six hours out of an eight-hour work day
8 is not supported by the medical evidence or by Plaintiff's testimony.
9 (Id. at 5.)

10 A claimant's RFC is what he is capable of doing despite his
11 physical and mental limitations. 20 C.F.R. § 404.1545(a)(1); *Cooper v.*
12 *Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "RFC is an
13 assessment of an individual's ability to do sustained work-related
14 physical and mental activities in a work setting on a regular and
15 continuing basis." SSR 9608p, 1996 WL 374184, at *1 (S.S.A. July 2,
16 1996). An RFC assessment is ultimately an administrative finding
17 reserved to the Commissioner, based on all of the relevant evidence,
18 including the diagnoses, treatment, observations, and opinions of
19 medical sources, such as treating and examining physicians. 20 C.F.R.
20 § 404.1527(e)(2).

21 In support of the RFC assessment, the ALJ cited opinions from two
22 of Plaintiff's treating physicians, Drs. Christopher H. Fleming, M.D.
23 and Dr. Neil J. Halbridge, M.D. (AR at 18-19.) Both Dr. Fleming and
24 Dr. Halbridge, who treated Plaintiff in the context of his worker's
25 compensation claim, determined that Plaintiff was precluded from
26 prolonged sitting, standing or walking. (Id. citing AR at 249, 268,
27 346.) In concluding that Plaintiff was able to sit, stand and/or walk
28 for six hours out of an eight-hour workday, the ALJ stated that

1 Plaintiff "must be allowed to change positions every 30 minutes for up
2 to 10 minutes." (AR at 16.)

3 There is insufficient medical evidence in the record to support
4 the ALJ's RFC assessment, which found that Plaintiff could sit, stand
5 and/or walk for six hours out of an eight-hour work day if he were
6 allowed to change positions for up to 10 minutes every 30 minutes.
7 Each of the physicians who treated Plaintiff, Drs. Halbridge, Fleming
8 and Dr. David Siambanes, D.O., concluded that Plaintiff was precluded
9 from prolonged sitting, standing and walking. None of these medical
10 opinions cited by the ALJ ever noted that Plaintiff would be able to
11 walk, sit and/or stand for six hours out of an eight-hour workday if
12 he were allowed to change positions for 10 minutes every thirty
13 minutes.

14 Although Dr. Fleming did state in a June 5, 2007 report that
15 Plaintiff "should avoid prolonged sitting or prolonged standing and
16 walking for more than one hour at a time or 4 hours, in an 8-hour day
17 without the ability to change positions" (AR at 268), he never opined
18 that changing positions for 10 minutes every thirty minutes would
19 enable Plaintiff to sit, stand and/or walk for six out of eight hours.
20 In fact, Dr. Fleming specifically limited Plaintiff to sitting,
21 standing and/or walking for no more than four hours out of an eight-
22 hour day. (Id.)

23 Furthermore, six months later, on December 3, 2007, Dr. Fleming
24 stated that he "agree[d] with Dr. Siambanes that preclusion against
25 heavy work as well as prolonged sitting and prolonged standing and
26 walking is appropriate." (AR at 249, citing AR at 232.) In addition,
27 two years later, on November 17, 2009, Dr. Halbridge, in agreement
28 with Dr. Fleming's December 3, 2007 report, concluded that Plaintiff

1 could not perform any "prolonged sitting or prolonged standing or
2 prolonged walking." (AR at 346.) None of the more recent medical
3 opinions concluded that Plaintiff would be able to sustain prolonged
4 sitting, standing and walking if he were allowed to change positions
5 for 10 minutes every 30 minutes.

6 Accordingly, the Court agrees with Plaintiff's contention that
7 the ALJ improperly determined Plaintiff's RFC because the medical
8 evidence cited by the ALJ does not support the RFC assessment.
9

10 **IV. Conclusion**

11 The decision whether to remand for further proceedings is within
12 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th
13 Cir. 2000). Where no useful purpose would be served by further
14 administrative proceedings, or where the record has been fully
15 developed, it is appropriate to exercise this discretion to direct an
16 immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether
17 to remand for further proceedings turns upon the likely utility of
18 such proceedings."); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir.
19 2004). However, where there are outstanding issues that must be
20 resolved before a determination of disability can be made, and it is
21 not clear from the record that the ALJ would be required to find the
22 claimant disabled if all the evidence were properly evaluated, remand
23 is appropriate. *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir.
24 2003); see also *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003)
25 (remanding case for reconsideration of credibility determination).

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Here, the ALJ failed to explain with sufficient specificity the basis for his determination that Plaintiff was not fully credible and failed to properly assess Plaintiff's RFC. Accordingly, the case is remanded for further proceedings consistent with this opinion and order.

DATED: March 13, 2012



Marc L. Goldman
United States Magistrate Judge